



Deputy Director Brian Oakey
Idaho State Department of Agriculture
2270 Old Penitentiary Rd
Boise, ID 83712

Submitted via email to: Brian.Oakey@isda.idaho.gov

August 13, 2020

Re: IDAPA 02.03.03 – RULES GOVERNING PESTICIDE AND CHEMIGATION USE AND APPLICATION

Dear Mr. Oakey:

On behalf of the Northwest Center for Alternatives to Pesticides (NCAP), the Idaho Conservation League (ICL), Idaho Organization of Resource Councils (IORC) and Visión 2C Resource Council (V2C), we offer the following comments with regards to the Idaho State Department of Agriculture (ISDA) negotiated rulemaking on Pesticide and Chemigation Rules (IDAPA 02.03.03). Again, we appreciate the opportunity to provide input on this important issue and look forward to continuing to engage in this rulemaking process.

The Northwest Center for Alternatives to Pesticide works to protect community and environmental health and inspire the use of ecologically sound solutions to reduce the use of pesticides. NCAP has been a resource for Idahoans seeking non-chemical and or least toxic management of invasive weeds, crop pests, and other unwanted species for over 20 years and has over 5,000 Idaho supporters. In Idaho, Christina Stucker-Gassi represents NCAP and serves on the EPA Pesticide Program Dialogue Committee representing the public health perspective.

Since 1973, the Idaho Conservation League has been Idaho's leading voice for clean water, clean air and wilderness—values that are the foundation for Idaho's extraordinary quality of life. The Idaho Conservation League works to protect these values through public education, outreach, advocacy and policy development. As Idaho's largest state-based conservation organization, we represent over 30,000 supporters, many of whom have a deep personal interest in protecting Idaho's water quality, aquatic habitat and communities from the harmful effects of inappropriate pesticide use and application.

The Idaho Organization of Resource Councils empowers people to improve the well-being of their communities, sustain family farms and ranches, transform local food systems, promote clean energy, and advocate for responsible stewardship of Idaho's natural resources. Visión 2C Resource Council strives for community driven social justice that is multi-generational, multicultural, and is representative of the people of Canyon County.

First, thank you for reestablishing the prohibition on any application of pesticides when sustained winds exceed 10 pmh, at 400.07 of the Second Pesticide Rule Strawman Proposal. We also appreciate the inclusion of a definition for pesticide drift at 010.24, and a prohibition on drift at 400.10. While we feel that these changes help to improve the rule, we continue to see opportunities for improvement.

We also appreciate the comment period extension. While we continue to feel that additional time is needed to answer important questions, we are hopeful that we will have opportunities for ongoing dialogue with ISDA and the Federal Aviation Administration as you continue to consider development of a Proposed Rule. Please keep each of our organizations on the mailing list for any additional information, rule updates, and public comment opportunities.

Our organizations would welcome the opportunity to weigh in on education and compliance assistance activities outside the scope of this rule making process. This could include discussions with the Department around continued efforts to strengthen reporting mechanisms for drift incidents and insuring everyone feels safe reporting compliance violations regardless of their employment situation or immigration status.

Additional detailed comments can be found following this letter. Please do not hesitate to contact lead-comment author Christina Stucker-Gassi at ctstuckergassi@pesticide.org or at 208-888-5024 if you have any questions about these comments, or need any additional information.

Sincerely,



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Appendices: Screenshots of schools and hospitals in proximity to agricultural fields (submitted separately due to file size).

Proposed Expanded definition:

We request the Department expand the existing definition of hazard areas.

-Incorporate proposed additions in yellow to the definition below-

- **Hazard Area.** Cities, towns, subdivisions, schools, hospitals, occupied structures, or densely populated areas.

Explanation: Schools, hospitals, and occupied structures should be added to the existing definition of hazard areas. Doing so retains language proposed for deletion in 400.6(a) Low Flying Prohibitions (page 16 of the second strawman). Inclusion of this language in the definition of hazard areas maintains protection of public safety and more clearly defines areas in which increased caution is warranted to protect vulnerable populations from pesticide spray drift. We also suggest that the Hazard Area Restriction section be adjusted, not deleted as proposed — language for that is proposed below.

Children and schools should be specifically protected because of childrens' sensitivity to pesticides. Research has suggested that even low levels of pesticide exposure can affect young children's neurological and behavioral development, demonstrating links physical and mental development¹. Further, because of the sensitivity of hospital patients, additional protections are warranted to avoid endangerment.

¹ Liu, J., & Schelar, E. (2012). Pesticide exposure and child neurodevelopment: summary and implications. *Workplace health & safety*, 60(5), 235–243. <https://doi.org/10.1177/216507991206000507>

Proposed New Definition:

We request the Department add the following definition to the chapter.

-Incorporate proposed new definition below-

- **32. Occupied Structure:** Occupied structure means a building with walls and a roof within which individuals live or customarily work.

Explanation: The definition of occupied structure already exists within Idaho Code (see 47-310) but is not defined in the chapter. Inclusion will protect the health of Idahoans living and working near pesticide application sites that face pesticide exposure from any form of pesticide application, including aerial applications.

Occupied structures are mentioned in section 400.6(b) Low Flying Prohibition (page 16 of the proposed rule), which is proposed for deletion. Retaining language around noticing occupied structures of spray operations is important, and we propose two ways to do so. 1) Retain the Low-Flying Prohibitions which include a prohibition on aircraft pilots from turning or low-flying during spray operations over occupied structures. 2) Add occupied structure to the definition of hazard areas as suggested above, and expressly state that ground and aerial applicators follow label restrictions around schools and other hazard areas, or ½ mile setback unless the wind is blowing in the opposite direction — whichever is more restrictive.

Discussion of 400.06. LOW-FLYING PROHIBITIONS -proposed for deletion (page 16 in the second strawman):

This is a section suggested for deletion by the IAAA during the 2020 legislative session. While ISDA argues that the Federal Aviation Administration (FAA) rules are “presumptively similar” to the preexisting Idaho regulation, there are notable differences. In particular, ISDA states that “Schools, Hospitals...are contained in cities, towns or settlements.” While many schools and hospitals are located centrally within developed communities, many are located outside of town, and/or directly adjacent to agricultural fields. This includes Rimrock Junior/Senior High (*Figure 1*), as well as numerous others: Bruneau Elementary, North Canyon Medical Center (Gooding), Notus High, Jerome High, Shoshone-Bannock High and Chief Targhee Elementary Schools and [dozens of others](#). Documentation of some of the other schools and hospitals will be submitted separately by ICL in support of these comments.

Under prior ISDA rules, “the pilot [must] obtain an agreement in writing for pesticide application from the authorized agent for the city, town, school, hospital, or densely populated area.” These rules helped to ensure that public health and sensitive populations received notification based on their increased risk.

Instead, the FAA rules would require notification of “the appropriate official or governing body of the political subdivision...” As a result, schools and/or hospitals will not have adequate opportunity to consider mitigating potential exposure to students, staff and patients.

Further, the ISDA has not been able to provide any rationale from, nor been able to identify a representative of the FAA to answer questions about their program, and how and whether proposed changes will impact their programs. In particular, we are concerned because apparently the FAA does not define “congested area” and has been reluctant to respond to questions posed during the rulemaking.



Figure 1: Rimrock Junior-Senior High School located adjacent to agricultural areas between the communities of Grandview and Bruneau, ID.

We advise the Department to retain low-flying prohibitions language in the chapter and not defer to the FAA. Joint regulation of low-flying planes applying pesticides is entirely appropriate to ensure protection of public and environmental health.

ISDA regulates pesticide use, not the FAA. Therefore, it is within the authority and is the prerogative of ISDA to set reasonable regulations on low flying activities related to pesticide application. If the Department moves forward with deleting this section ISDA should demonstrate how the FAA currently administers the program, whether any changes in the program are anticipated (in the absence of ISDA regulations), and how the FAA monitors compliance in a manner to protect public health including how the Department will be involved in investigations involving pesticides application.

As noted above, ISDA provided a Discussion Memo (Idaho's Low-Flying Rules Compared to FAA Regulations) which included an analysis of FAA rules, but gaps in understanding remain. In addition to the aforementioned issue of congested areas, and school/hospital notification, FAA identifies a process to file a complaint about a low flying aircraft, but FAA does not have a complaint process for when overspray from an aerial applicator lands on people or property.

-Retain the following in full-

06. LOW-FLYING PROHIBITIONS. Aircraft pilots during spray operations are prohibited from turning or low-flying: (3-20-20)T

- a. Over cities, towns, schools, hospitals and densely populated areas unless the pilot obtains an agreement in writing for pesticide applications from the authorized agent for the city, town, school, hospital, or densely populated area in question; or (3-20-20)T
- b. Directly over an occupied structure without prior notification by some effective means such as daily newspapers, radio, television, telephone, or door-to-door notice. (3-20-20)T
- c. Restriction. The low-flying restrictions listed in Subsection 400.06(a) shall only pertain to persons other than those persons whose property is to be treated. (3-20-20)T

Proposed Changes to Existing Language:

Discussion of 400.06. APPLICATION NEAR HAZARD AREAS -proposed for deletion- (page 18 in the second strawman):

This is another section suggested for deletion by the IAAA during the 2020 legislative session. While reviewing HB 487 and deliberating over changes it proposed to this chapter, the Senate Agriculture Committee had substantial concerns with potential impacts on human health and sensitive populations. In order to protect public health, and because no other protections will be provided by federal regulations, we urge that this section be retained and strengthened.

By retaining and strengthening this section ISDA would be fostering further reductions in drift onto hazard areas and would keep restrictions in line with language under the 400.08 (a) (ii) and (b) (ii) which is retained (page 17 of the second strawman). Proposed changes below mirror language changes made in the wind velocity section as it pertains to labels. It would also provide guidance for all applicators that is consistent with having jurisdiction over label enforcement, WPS compliance and pesticide use and safety generally.

Metam sodium, a commonly used pesticide in potato production, requires setbacks from schools and other vulnerable populations on it's label regardless of application type. The ISDA rule language proposed for deletion requires a ½ mile setback when pesticides are being applied aerially, unless wind is blowing away from the hazard area. Since the FAA rule references only altitude, not distance, retaining the ½ mile setback language would not be duplicative.

-Retain the following and incorporate proposed edits in yellow-

06. APPLICATION NEAR HAZARD AREAS. All pesticide aerial or ground applications near hazard areas must be properly noticed according to Worker Protection Standards and label requirements. An aircraft pilot will not apply any pesticide within one-half (½) mile of a hazard area unless there is air movement away from the hazard area or within a setback required by product label directions, whichever is more restrictive. (3-20-20)T

Discussion of 400.10. PESTICIDE DRIFT PROHIBITIONS (page 18 in second strawman):

10. PESTICIDE DRIFT PROHIBITIONS. The application of pesticides that result in drift outside of the target area is prohibited.

In order to retain reference to hazard areas, please consider expressly mentioning hazard areas in this section, or wherever the Department deems appropriate, if the 400.06 Application Near Hazard Areas section is removed.